STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2003
v	No. 239985 Wayne Circuit Court
FRANCIS TARPEY, Defendant-Appellant.	LC No. 00-009467

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for child sexually abusive activity, MCL 750.145c(2). Defendant was sentenced to eighteen months to twenty years in prison. We affirm.

Defendant challenges the sufficiency of the evidence supporting his conviction. A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Circumstantial evidence, and reasonable inferences arising from it, may be sufficient to prove the elements of a crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Specifically, defendant contends that the prosecution failed to prove an essential element of child sexually abusive activity, MCL 750.145c(2). The applicable version of MCL 750.145c provides in relevant part:[1]

> (2) A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or finance any child sexually abusive activity or child

[1] The legislative history of MCL 750.145c indicates that the language of the statute was amended in 2002. However, because those amendments were made and did not take effect until after the date of defendant's offense in the present case, they are inapplicable to this case.

> sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, **if that person knows, has reason to know, or should reasonably be expected to know that the child is a child, or that person has not taken reasonable precautions to determine the age of the child**. [Emphasis added.]

Defendant notes that the person he was chatting with on the Internet was not actually a child, but a police officer posing as a thirteen-year-old girl. Defendant contends that he could not have known that the person was a child, as required by the portion of the statute emphasized above, because the person he was chatting with was not, in fact, a child. Therefore, he contends that the knowledge element could not, and was not, proven.

Although defendant argues to the contrary, we agree with the prosecution that this Court's decision in *People v Thousand*, 241 Mich App 102; 614 NW2d 674 (2000), rev'd on other grounds 465 Mich 149 (2001), is instructive in resolving the issue raised by defendant in the instant case. In *Thousand*, as in the present case, an undercover police officer posed as a young girl on the Internet. *Id.* at 104. During their Internet chats, the defendant made sexual comments to the fictitious girl, sent "her" a picture of his penis, told her he wanted to take her to his home so they could engage in sexual activity, and arranged to meet her at a McDonald's in Detroit. *Id.* When the defendant arrived for the prearranged meeting, he was arrested. *Id.* The *Thousand* panel concluded that the trial court erred in finding that it was legally impossible for the defendant to have committed child sexually abusive activity on the basis that the charged offense required the existence of a minor as a victim or potential victim, and no minor child had actually been involved in the matter. *Id.* at 105, 117. Instead, we held that MCL 750.145c(2) does not actually require conduct involving a minor, but merely requires that the defendant *prepare* to arrange for child sexually abusive activity. *Id.* at 116. Therefore, the defendant could be guilty of child sexually abusive activity even though the potential victim proved to be an adult rather than a child. *Id.* at 117.

Although the defendant in *Thousand* argued more generally that the statute required the existence of a child, rather than specifically in relation to the knowledge requirement as defendant in this case argues, we hold that the rationale set out in *Thousand* is nonetheless applicable to the present case. Applying that reasoning here, we conclude that the fact that the potential victim turned out to be an adult male police officer, rather than a child, did not preclude the prosecution from being able to prove that defendant had the requisite knowledge under MCL 750.145c(2) because the actual existence of a child is not necessary in order to find a person guilty under the statute. *Thousand*, *supra* at 116-117. In other words, because the statute addresses preparation to commit an offense, in addition to committing an offense, the statute may be violated where a defendant is under the mistaken belief that he is preparing to engage in conduct that would, as far as he or she knows, violate the statute.

Here, the jury could have inferred from defendant's actions and the surrounding circumstances that he knew, had reason to know, or should have been reasonably expected to know that the person he was communicating with was a child. Knowledge can be inferred from the surrounding circumstances and reasonable inferences arising from the evidence. *People v Lang*, 250 Mich App 565, 576-577; 649 NW2d 102 (2002). The record indicates that at the beginning of their first online chat, the officer told defendant that "she" was thirteen years old and that she was a virgin, and she concluded that first chat by telling defendant that she had to go

because her mother was calling her. During a later conversation, defendant expressed concern about getting the person in trouble with her parents or at school if they decided to meet in person. The officer specifically told defendant at that time that she was going to be fourteen years old on June 14th. During their next chat, defendant acknowledged that the person he was talking to was too young to marry him because a person has to be eighteen years old to enter into a legal marriage. Defendant also encouraged her to use more "adult words" to express herself sexually. Further, the officer e-mailed defendant a picture of a young girl, telling defendant that it was a picture of the girl defendant had been communicating with online. Moreover, the officer asked defendant to bring the fictitious girl a teddy bear, and during one of their last conversations before they were scheduled to meet in person, the officer asked defendant if he had ever had sex with a fifteen-year-old girl "like her." Under these circumstances, and viewing the evidence in a light most favorable to the prosecution, the jury had ample circumstantial evidence to infer that defendant knew, had reason to know, or should reasonably have been expected to know that he was preparing to engage in statutorily prohibited conduct with a potential victim that was a minor child. *Avant, supra* at 505. Thus, we reject defendant's challenge to the sufficiency of the evidence supporting his conviction. *Nowack, supra* at 399.

Next, defendant contends that the trial court erred when it rejected his proposed jury instruction regarding the elements of child sexually abusive activity and instead gave the prosecution's proposed instruction. We review jury instructions as a whole to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

The instruction given by the court provided in relevant part:

> To prove this charge the Prosecutor must prove each of the following elements beyond a reasonable doubt. . . . . And, third, the Defendant . . . *believed* that the intended victim was a child. [Emphasis added.]

Defendant contends that it was erroneous to instruct the jury that the prosecution had to prove that defendant *believed* that the potential victim was a child because MCL 750.145c(2) requires that the prosecution prove that defendant *knew or should have known* that the victim was a child. We believe that the trial court did not err in incorporating the language used in the *Thousand* decision, even though it did not strictly follow the statute. Indeed, in *Thousand*, we ruled that the focus of the statute is on what the perpetrator intended and believed rather than on what the facts actually were. See *Thousand, supra* at 116. Because the instruction was consistent with the *Thousand* panel's holding, we conclude that it adequately protected defendant's rights. *Aldrich, supra* at 105.

Finally, defendant contends that the prosecutor engaged in prosecutorial misconduct when it introduced inadmissible character evidence under MRE 404(a)(1). Specifically, defendant contends that the prosecutor improperly elicited testimony from Dr. Andrew Barclay that defendant was narcissistic, a risk taker, and liked to be in control. Defendant also contends that the prosecutor improperly referenced this testimony during closing arguments. Because defendant failed to object to the prosecutor's conduct at trial, we review defendant's claim for plain error. *People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2000).

Ordinarily, we review claims of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context to determine whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Here, we believe that the prosecutor plainly violated MRE 404(a)(1) when it elicited the testimony providing character evidence. Indeed, Dr. Barclay's testimony was brief, and the prosecutor asked these questions shortly after objecting several times to defendant's attempts to introduce favorable character evidence. But we are not persuaded that the plain error was outcome determinative. We note that Dr. Barclay's testimony was extremely brief. Moreover, on redirect examination, Dr. Barclay concluded his testimony by explaining that a person who is narcissistic is not necessarily a sex offender. More importantly, considering the weight of the evidence of defendant's guilt, we simply cannot conclude that the jury needed to rely on the character evidence to reach a finding that defendant was guilty of the instant offenses. *Watson*, *supra* at 586. For the same reasons, we are not persuaded that the prosecutor's reference to this testimony in closing argument was outcome determinative.[2] *Id.* Accordingly, defendant may not avoid forfeiture of this issue. *Schutte*, *supra* at 720.

Affirmed.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette

[2] Defendant also contends that his trial counsel was ineffective for failing to object below. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id.* at 423-424. Having already concluded that the testimony and argument was not outcome determinative, we conclude that defendant has failed to demonstrate that, but for trial counsel's failure to object, the jury would not have convicted him. Accordingly, defendant was not deprived of his constitutional right to effective assistance of counsel.